No. 75-1277

# In the Supreme Court of the United States

OCTOBER TERM, 1975

A. L. BURBANK & CO., LTD., BANK OF TOKYO, LTD., AND WESTWARD SHIPPING, LTD., PETITIONERS

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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CITATIONS





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**OPINIONS BELOW**

The opinion of the district court (Pet. App. B 18a–29a) is not reported. The opinion of the court of appeals (Pet. App. A 1a–17a) is reported at 525 F. 2d 9.

**JURISDICTION**

The judgment of the court of appeals was entered on October 22, 1975 (Pet. App. D 32a–33a). A timely petition for rehearing with a suggestion for rehearing *en banc* was denied on December 23, 1975 (Pet. App. C 30a–31a). The petition for a writ of certiorari was

filed on March 8, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether upon request of the Canadian tax authorities in accordance with Articles XIX and XXI of the Income Tax Convention between the United States and Canada, the Internal Revenue Service can summon information from United States-based corporations, pursuant to its authority under 26 U.S.C. 7602, for the sole purpose of aiding a Canadian tax investigation.

2. Whether a Canadian corporation has a right to intervene in an Internal Revenue summons enforcement proceeding to compel the production of third-party bank and brokerage records located in the United States.

## TREATIES, STATUTES AND REGULATIONS INVOLVED

The pertinent portions of Section 7602 and 7604 of the Internal Revenue Code of 1954 (26 U.S.C.), of Articles XIX and XXI of the Income Tax Convention with Canada of March 4, 1942, 56 Stat. 1405 and 1406, and of Section 519.120 of the Treasury Regulations pertaining to the Income Tax Convention with Canada (26 C.F.R.) are set forth at pp. 3–7 of the petition.

The other pertinent statute, Section 7852(d) of the Internal Revenue Code (26 U.S.C.), states as follows:

**SEC. 7852. Other applicable rules.**

* * * * *



**(d) Treaty obligations.**

No provision of this title shall apply in any case where its application would be contrary to any treaty obligation of the United States in effect on the date of enactment of this title.

## STATEMENT

Pursuant to a request from the Canadian tax authorities under Articles XIX and XXI of the Income Tax Convention between the United States and Canada, the Internal Revenue Services issued summonses to petitioners Bank of Tokyo, Ltd., and A. L. Burbank & Co., Ltd., to produce books and records in their possession which were relevant to the potential tax liability of Westward Shipping, Ltd., a Canadian corporation which has no presence in the United States. In this summons enforcement proceeding brought by the government in the United States District Court for the Southern District of New York, both Burbank and the Bank of Tokyo agreed to take no position in the proceedings. Petitioner Westward, the taxpayer under investigation by the Canadian tax authorities, sought to intervene to prevent the enforcement of the summenses. Pursuant to a stipulation of the parties to the proceedings, the government agreed that the summonses were issued solely as a result of a request by the Canadian tax authorities under the Income Tax Convention between the United States and Canada in connection with a Canadian tax investigation of Westward. Westward in turn agreed that the materials sought were relevant to the Canadian tax

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investigation. After the district court ruled that Westward had no standing to intervene, Burbank and the Bank of Tokyo agreed to oppose the enforcement of the summonses (Pet. App. A 3a–5a; Pet. App. B 19a–23a).

The district court denied enforcement of the summonses. It held that the United States-Canada Tax Convention provided no independent compulsory process apart from the Internal Revenue Code and that Section 7602 of the Code authorized the issuance of a summons to produce books and records only in connection with the determination of a United States tax liability (Pet. App. B 23a–27a). The district court also held that under this Court's decision in *Donaldson* v. *United States*, 400 U.S. 517, Westward had no right to intervene where, as here, only books and records of a third party were the subjects of the summonses (Pet. App. B 28a–29a).

The court of appeals reversed the district court's order with respect to enforcement of the summonses (Pet. App. A 1a–16a). It held that Articles XIX and XXI of the Tax Convention authorized the United States to exercise the same investigative summons power that could be employed in an investigation of a United States tax liability in connection with a request for information by the Canadian tax authorities (Pet. App. A 5a–10a). The court of appeals also affirmed the district court's holding that Westward had no right to intervene in the summons enforcement proceeding (Pet. App. A 17a).



## ARGUMENT

1. The court of appeals correctly held, in what it characterized as (and petitioners concede to be) a case "of first impression in this country" (Pet. App. A 3a; Pet. 19),[1] that Articles XIX and XXI of the Income Tax Convention of March 4, 1942, between the United States and Canada authorized the Internal Revenue Service to issue summonses under 26 U.S.C. 7602 to examine books and records of third parties solely in aid of a Canadian tax investigation. The language and policy objectives of the Tax Convention with Canada, the understanding of the United States Senate in ratifying the Convention, and the Senate's understanding of similar provisions in other income tax treaties, all support the enforcement of the summonses ordered by the court of appeals.

Article XIX of the United States–Canada Tax Convention provides in pertinent part (56 Stat. 1405):

> With a view to the prevention of fiscal evasion, each of the contracting States undertakes to furnish to the other contracting State, as provided in the succeeding Articles of this Convention, the information which its competent authorities have at their disposal or are in a position to obtain under its revenue laws in so far as such information may be of use to the authorities of the other contracting State in the

[1] Although petitioners assert (Pet. 23–24) that numerous cases are in conflict with the decision below, those cases all involve summonses for the determination of United States tax liabilities and do not concern the provisions of any tax treaty.

assessment of the taxes to which this Convention relates.

Article XXI, Section 1, states (56 Stat. 1406):

> If the [Canadian] Minister [of National Revenue] in the determination of the income tax liability of any person under any of the revenue laws of Canada deems it necessary to secure the cooperation of the [United States] Commissioner [of Internal Revenue], the Commissioner may, upon request, furnish the Minister such information bearing upon the matter as the Commissioner is entitled to obtain under the revenue laws of the United States of America.

Thus, under the plain terms of the Convention, where the Canadian Minister of National Revenue seeks information from the Commissioner of Internal Revenue for a Canadian tax investigation, the United States undertakes to furnish, and the Commissioner may obtain under the revenue laws of the United States (which include the summons power of 26 U.S.C. 7602), information that is relevant in the determination of the income tax liability of any person under the Canadian tax laws. Indeed, since Article XXI specifically refers to information concerning "the income tax liability of any person under any of the revenue laws of Canada," there is no basis for limiting the exchange of information provisions to information that might bear only upon a United States tax liability. Accord: Section 519.120, Treasury Regulations on the Income Tax Convention with Canada (26 C.F.R.).[2]

[2] The Treasury Regulations on the Income Tax Convention with Canada were reviewed and agreed upon at joint meetings by both



As the decisions of this Court have well established (see, *e.g.*, *United States* v. *Bisceglia*, 420 U.S. 141, and cases cited therein), one investigatory procedure available to the Commissioner to obtain information is the summons power conferred by Section 7602 of the Code. Such summonses may be issued to examine books, papers, records, or other data, or to command the presence of any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax "[f]or the purpose of ascertaining the correctness of any return * * * [or] determining the liability of any person for an internal revenue tax * * *." As the court of appeals observed (Pet. App. A 10a), Section 7852(d) of the Code, which forbids the application of any provision of the Code contrary to any treaty obligation of the United States, refutes the contention of petitioners Burbank and the Bank of Tokyo (Pet. 20–24) that the Section 7602 summons power requires the existence of a United States tax investigation or liability. Since the Tax Convention with Canada requires the United States to use its procedural powers to obtain information for the determination of the income tax liability of any per-

countries. Statement of Eldon P. King, Special Deputy Commissioner, Bureau of Internal Revenue, Hearings on Executive A, Convention with France on Double Taxation before a Subcommittee of the Senate Committee on Foreign Relations, 80th Cong., 1st Sess. 24 (1947) (1 Leg. Hist. of United States Tax Convs. 945, 962 (1962)).

son under any revenue laws of Canada, the Convention thus clearly authorizes the use of the summons power.

That the United States was obligated to employ every procedure available under the Internal Revenue Code, including the summons power, to obtain information relevant to an investigation with respect to a Canadian tax liability, without reference to any tax liability to the United States, is evident from the scheme and policy of the Convention. The dual purposes of the Convention, as recited in its preamble and set forth in its substantive provisions, were to avoid double taxation and to prevent fiscal evasion. To accomplish the former purpose, the Convention contains a number of provisions under which income of individuals or corporations resident or based in one country, derived from activity or sources in the other, which would otherwise be subject to taxation by both countries, is to be taxed only by the country of residence or base, *i.e.*, by the "permanent establishment." [3] To avoid abuse of these and similar provisions and to prevent evasion of the income tax law of the taxing State, each State agreed under Articles XIX and XXI to furnish the other with information relevant to the requesting State's tax investigation that the requested State could obtain under the mechanisms of its domestic law.

If petitioners were correct that the United States could not use the summons authority of the Internal

[3] In other instances, such as where a taxpayer has permanent establishments in both countries, income, for purposes of taxation, is allocated to one or the other country.



Revenue Service to fulfill its treaty obligation where only a Canadian tax investigation is at stake, the result would be that neither State could obtain a large amount of relevant information. For example, in the case of a Canadian resident earning income from an activity or source within the United States, Canada could not obtain the information from American sources because its process does not reach within the United States. Likewise, the United States, under petitioners' construction of the Convention, could not obtain the information at the request of Canadian authorities because, by virtue of the treaty provisions against double taxation, there would be no United States tax interest involved. That result would not only facilitate abuse of the provisions against double taxation, it would, as the court of appeals observed (Pet. App. A 8a), "negate the very purpose of the Treaty." [4]

2. The decision below is in accord with the legislative history of the Tax Convention with Canada. At

[4] In generally discussing the exchange of information provisions in the United States tax treaties, including the tax treaty with Canada, Mr. King, Special Deputy Commissioner, Bureau of Internal Revenue, stated (Hearings on Executive A, Convention with France on Double Taxation before a Subcommittee of the Senate Committee on Foreign Relations, 80th Cong., 1st Sess. 21 (1947) 1 Leg. Hist. of United States Tax Convs. 945, 959, (1962)): "The theory back of all our conventions to date in that regard has been that if countries meet to eliminate or substantially eliminate double taxation, and make every possible effort they can in that direction, that regime should be accompanied by provisions for effective administrative cooperation. Otherwise it is quite easy in this field to produce a situation where, in the process of eliminating double taxation, we end up with no taxation at all."

the time of its ratification of the Convention, the Senate understood that the contracting States were to use their procedural powers to obtain information solely for the determination of a tax liability of the requesting State. This is made clear by the following remarks of Senators Taft and George during the debate on the Treaty (88 Cong. Rec. 4714 (1942)), upon which the court of appeals relied (Pet. App. A 16a–17a, n. 7):

> Mr. TAFT. * * * In other words, if an American citizen were using a Canadian bank deposit to evade income taxation, I think the convention would permit the United States Government to ask the Canadian Government to obtain information from its own bank and furnish it to this Government in connection with the enforcement of our internal-revenue laws.
>
> Mr. GEORGE. It does provide for exchange of information, as the Senator from Ohio points out.
>
> Mr. TAFT. But no general information of that kind would be requested except perhaps in specific cases in which inquiry was being made relative to income-tax evasion.

To the same effect is a letter from the Acting Secretary of State which accompanied the Treaty when it was presented to Congress for ratification. S. Exec. B, 77th Cong., 2d Sess. 1, 2, 4–5 (1942) (1 Leg. Hist. of United States Tax Convs. 445, 448–449 (1962)); Pet. App. A 16a, n. 7.



Moreover, virtually all of the other tax treaties in effect between the United States and foreign countries contain exchange of information provisions similar to the Canadian treaty.[5]

[5] In addition to the income tax treaties with Canada, Switzerland and Luxembourg, similar exchange of information provisions are included in the following treaties: Income Tax Convention with Australia, May 14, 1953, 4 U.S. Treaties (Part 2) 2274, 2285, Art. XVIII; Estate Tax Convention with Australia, May 14, 1953, 5 U.S. Treaties (Part 1) 92, 99, Art. VI; Income Tax Convention with Austria, October 25, 1956, 8 U.S. Treaties (Part 2) 1699, 1708–1709, Art. XVI; Income Tax Convention with Belgium, July 9, 1970, 23 U.S. Treaties (Part 3) 2687, 2710, Art. 26; Estate Tax Convention with Canada, February 17, 1961, 13 U.S. Treaties (Part 1) 382, 387–388, Arts. VII, VIII, IX; Income Tax Convention with Denmark, May 6, 1948, 62 Stat. 1730, 1736, Art. XVII; Income and Property Tax Convention with Finland, March 6, 1970, 22 U.S. Treaties (Part 1) 40, 74–75, Art. 29; Estate Tax Convention with Finland, March 13, 1952, 3 U.S. Treaties (Part 3) 4464, 4469–4470, Art VII; Income and Property Tax Convention with France, July 28, 1967, 19 U.S. Treaties (Part 4) 5280, 5313–5314, Art. 26; Income Tax Convention with the Federal Republic of Germany, July 22, 1954, 5 U.S. Treaties (Part 3) 2768, 2800–2802, Art. XVI(1), (3), as amended by the Protocol to the Income Tax Convention with the Federal Republic of Germany, September 17, 1965, 16 U.S. Treaties (Part 2) 1875, 1888, Art. 14; Income Tax Convention with Greece, February 20, 1950, 5 U.S. Treaties (Part 1) 47, 75, 77, 79, Arts. XVIII, XX; Estate Tax Convention with Greece, February 20, 1950, 5 U.S. Treaties (Part 1) 12, 27, 29, 31, Arts. VIII, X; Income and Capital Tax Convention with Iceland, May 7, 1975, Art. 29 (1 C.C.H. Tax Treaties, par. 3732); Income Tax Convention with Ireland, September 13, 1949, 2 U.S. Treaties (Part 2) 2303, 2316, Art. XX; Estate Tax Convention with Ireland, September 13, 1949, 2 U.S. Treaties (Part 2) 2294, 2300, Art. VII; Income Tax Convention with Italy, March 30, 1955, 7 U.S. Treaties (Part 3) 2999, 3013–3014, Art. XVII; Estate Tax Convention with Italy, March 30, 1955, 7 U.S. Treaties (Part 3) 2977, 2983–2984, Art. VI; Income Tax Conven-

Thus, for example, Article XVIII of the Income Tax Treaty with Luxembourg of December 18, 1962, 15 U.S. Treaties (Part 2) 2355, 2367, provides that "[t]he competent authorities of the Contracting

tion with Japan, March 18, 1971, 23 U.S. Treaties (Part 1) 967, 1006–1007, Art. 26; Estate Tax Convention with Japan, April 16, 1954, 6 U.S. Treaties (Part 1) 113, 123, Art. VI; Income Tax Convention with the Netherlands, April 29, 1948, 62 Stat. 1757, 1766, Art. XXI; Income Tax Convention with New Zealand, March 16, 1948, 2 U.S. Treaties (Part 2) 2378, 2387–2388, Art. XVI; Income and Property Tax Convention with Norway, December 3, 1971, 23 U.S. Treaties (Part 3) 2832, 2857–2858, Art. 28; Estate Tax Convention with Norway, June 13, 1949, 2 U.S. Treaties (Part 2) 2353, 2357–2358, Arts. VII, VIII; Income Tax Convention with Pakistan, July 1, 1957, 10 U.S. Treaties (Part 1) 984, 993, Art. XVI; Income Tax Convention with Sweden, March 23, 1939, 54 Stat. 1759, 1768–1772, Arts. XV, XVI, XVIII, XIX; Income Tax Convention with Trinidad and Tobago, January 9, 1970, 22 U.S. Treaties (Part 1) 164, 185, Art. 24; Income Tax Convention with the Union of South Africa, December 13, 1946, 3 U.S. Treaties (Part 3) 3821, 3829–3830, Arts. XIV, XVI, XVII; Estate Tax Convention with the Union of South Africa, April 10, 1947, 3 U.S. Treaties (Part 3) 3792, 3799, Art. VII; Income Tax Convention with the United Kingdom of Great Britain and Northern Ireland, April 16, 1945, 60 Stat. 1377, 1386, Art. XX; Estate Tax Convention with the United Kingdom of Great Britain and Northern Ireland, April 16, 1945, 60 Stat. 1391, 1394–1395, Art. VII.

In addition to the treaties now in force, a similar exchange of information provision is contained in the recently signed Income Tax Convention with the United Kingdom of Great Britain and Northern Ireland of December 31, 1975, Art. 26 (2 C.C.H. Tax Treaties, par. 8103); Income Tax Convention with the Polish People's Republic of October 8, 1974, Art. 23 (2 C.C.H. Tax Treaties, par. 7026); Income Tax Convention with Romania of December 4, 1973, Art (2 C.C.H. Tax Treaties, par. 7278); and the Income Tax Convention with the United Arab Republic of October 28, 1975, Art. 28 (2 C.C.H. Tax Treaties, par. 8033).



States shall exchange such information, being information available under the respective taxation laws of the Contracting States, as is necessary for carrying out the provisions of the present Convention or for the prevention of fraud or the like in relation to the taxes which are the subject of the present Convention." The Senate Report accompanying this treaty (S. Exec. Rep. No. 10, 88th Cong., 2d Sess. 38 (1964)) stated that "The information to be exchanged [under Article XVIII] is that which would be available under the taxation laws of the country to which the request for information is directed if the tax of the requesting country were its own tax." The equating of the foreign tax to the United States tax removes any impediment to the use of an administrative summons simply because there is no concurrent United States tax liability involved.[6] Such similar treaty pro-

[6] See also the legislative history of Article XX of the Income Tax Convention with the United Kingdom of Great Britain and Northern Ireland of April 16, 1945, 60 Stat. 1377, 1386, and of Articles 8 through 11 of the Income and Estate Tax Convention with France of October 18, 1946, 64 Stat. B3, B15–B20, where the Canadian exchange of information provisions were mentioned. S. Exec. Rep. No. 4, 79th Cong., 2d Sess. 21 (1946) (2 Leg. Hist. of United States Tax Convs. 2721, 2741 (1962)); Hearing on Conventions with Great Britain and Northern Ireland Respecting Income and Estate Taxes before a Subcommittee of the Senate Committee on Foreign Relations, 79th Cong., 1st Sess. 56–57 (1945) (2 Leg. Hist. of United States Tax Convs. 2583, 2622–2623 (1962)); Hearings on Executive A, Convention with France on Double Taxation before a Subcommittee of the Senate Committee on Foreign Relations, 80th Cong., 1st Sess. 21–23, 26, 79 (1947) (1 Leg. Hist. of United States Tax Convs. 945, 959–961, 964, 1017 (1962)).

The portion of the legislative history upon which petitioners rely (Pet. 25–26) is irrelevant. First, the statement they cite deals

visions, as this Court has held, are highly relevant in construing the Treaty at issue. See, *e.g., Kolovrat* v. *Oregon,* 366 U.S. 187, 193, 196; *Charlton* v. *Kelly,* 229 U.S. 447, 467, 473.[7]

with collection of taxes for a foreign State (a provision found in certain of the United States tax treaties, but not included in the Canadian treaty) and not with the exchange of information with a foreign State. Second, the statement does not purport to list all the Code provisions with respect to the collection of taxes.

With respect to the legislative history of the recent Iceland, Polish, and Romanian Tax Conventions, see S. Exec. Rep. No. 94–15, 94th Cong., 1st Sess. 5, 7 (1975), and the technical explanations, which are unofficially published at 1 C.C.H. Tax Treaties, par. 3739 and 2 C.C.H. Tax Treaties, pars. 7032 and 7285.

[7] Although the question in this case is "one of first impression in this country" (Pet. App. A 3a), the Federal Tribunal of Switzerland (the highest court in Switzerland) faced the same issue in the context of a similar exchange of information provision (Article XVI) in the Swiss-American Tax Convention of May 24, 1951, 2 U.S. Treaties (Part 2) 1753, 1760–1761. In *X* v. *Eidgenössische Steuerverwaltung* (*The Federal Tax Administration*), 96 (I) B.G.E. 737, 746–747 (official text), [1971] J. Trib. 1, 571, 580 (French translation), 71–1 U.S.T.C., par. 9435, p. 86,571 (unofficial English translation), the Swiss court held that the Swiss Federal Tax Administration could use domestic investigatory procedures to obtain information relevant to a United States tax investigation even though there was no concurrent Swiss tax investigation. Contrary to petitioners' assertion (Supp. Pet. 3), there is no reason to believe that the court of appeals, which did not cite the Swiss authority in its opinion, would have reached a different result if it had been aware of the subsequent high court Swiss decision in *X. and Y-Bank* v. *Eidgenössische Steuerverwaltung*, 101 (I) B.G.E. 160, 163–165 (official text), 37 A.F.T.R. 2d 76–1282 (unofficial English translation). There, the court held that the exchange of information provision of the Swiss-American Tax Convention of May 24, 1951, did not authorize the Swiss Federal Tax Administration to transmit records authenticated for use



Contrary to petitioners' contention (Pet. 17–20), the fact that the Canadian Government may have at one time taken a position different from that of the United States[8] with respect to the circumstances under which it would furnish information to the United States tax authorities does not cast doubt upon the correctness of the decision below. As the court of appeals observed (Pet. App. A 11a), it is not clear that the Canadian Government has ever

in an American court. However, the question of authentication of documents for use in a judicial proceeding is not involved here. Thus, petitioners' accusation (Supp. Pet. 5–9) that the government withheld its knowledge of the second Swiss decision from the court of appeals is likewise irrelevant. In fact, we first learned of the second *X* case after the filing of the petition.

[8] The part of the Internal Revenue Service Manual cited by petitioners (Pet. 17) was added to the Manual by T.M. 9200–5 on May 24, 1962, and was addressed to agents as to what requests should contain when information was to be sought from Canada under the exchange of information provisions. We are advised by the Internal Revenue Service that this provision in the Manual resulted from conversations between officials of the Internal Revenue Service and of the Canadian Ministry of Revenue between 1960 and 1962 and reflected the Internal Revenue Service's understanding, though not approval, of the Canadian position at that time. The fact that the provisions cited by petitioners do not apply to other treaties, which have the same exchange of information provisions, indicates that the cited position reflects only a Canadian position, and not a United States position. See Section 9265.3, Internal Revenue Service Manual of 1962 and Section 9265.3 of the Internal Revenue Service Manual of 1974.

At all events, the Manual is not authoritative as to either the position of the United States or Canada. See *Biddle* v. *Commissioner*, 302 U.S. 573, 582; *Dixon* v. *United States*, 381 U.S. 68, 73; *Rosenberg* v. *Commissioner*, 450 F. 2d 529 (C.A. 10).

officially differed with the United States concerning the interpretation of the Convention. At all events, this Court has held in *Charlton* v. *Kelly*, 229 U.S. 447, 473, *Factor* v. *Laubenheimer*, 290 U.S. 276, and *Whitney* v. *Robertson*, 124 U.S. 190, 194–195, that it is the interpretation of the United States, and not of its treaty partner, that is controlling. "Until a treaty has been denounced, it is the duty of both the government and the courts to sanction the performance of the obligations reciprocal to the rights which the treaty declares and the government asserts, even though the other party to it holds to a different view of its meaning." *Factor* v. *Laubenheimer, supra*, 290 U.S. at 298.

3. Petitioners further contend (Pet. 27–32) that the court of appeals based its judgment upon facts outside of the record, *viz.*, the Internal Revenue Service Manual, the commentary of the Model Treaty of the Organization for Economic Co-operation and Development (OECD), and the provisions of other tax treaties. As we have pointed out (*supra*, pp. 5–14), the decision of the court of appeals primarily rests upon the language, policy, and legislative history of the Tax Convention with Canada (Pet. App. A 5a–11a). But the Internal Revenue Service Manual, the OECD Model Treaty, and similar tax treaties considered by the court of appeals (Pet. App. A 11a–16a) were not "facts" outside of the record but legal authorities. It was therefore entirely proper for the court of appeals to look to these sources in construing the provisions of the Tax Convention with Canada.



Indeed, in determining the meaning of a treaty, this Court has considered the construction placed upon the treaty by the political departments of the governments responsible for its enforcement, the negotiations and legislative history of the treaty, the history and interpretation of similar provisions in other treaties, the meaning given to identical terms in the public international law and the decisions of foreign courts involving similar treaties, whether or not such materials had been presented to the lower courts. *Factor* v. *Laubenheimer, supra*, 290 U.S. at 294–295; *Charlton* v. *Kelly, supra*, 229 U.S. at 467–476; *Geofroy* v. *Riggs*, 133 U.S. 258, 271; *Wildenhus's Case*, 120 U.S. 1, 13–17.

4. Finally, petitioner Westward contends (Pet. 33–36) that the court of appeals erred in upholding the district court's refusal to permit it to intervene in this summons enforcement proceeding (Pet. App. A 17a). But, as the Court pointed out in *Donaldson* v. *United States*, 400 U.S. 517, 523, a taxpayer has no absolute right to intervene to bar production of records "in which the taxpayer has no proprietary interest of any kind, which are owned by the third person, which are in his hands, and which relate to the third person's business transactions with the taxpayer." See also *id.* at 530. Indeed, even if a criminal investigation of Westward had been in progress, the enforcement of the summonses compelling the production of bank and brokerage records would not have violated Westward's right under either the Fourth or Fifth Amendment. *United States* v. *Miller*, No. 74–1179, decided April 21, 1976, slip op.

8–9; *California Bankers Assn.* v. *Shultz,* 416 U.S. 21, 53; *Donaldson* v. *United States, supra,* 400 U.S. at 537 (Douglas, J., concurring). Thus, petitioner Westward possessed no interest that could have been vindicated by a challenge to the summonses. The court of appeals therefore correctly affirmed the district court's order denying Westward the right to intervene.

Petitioner Westward does not dispute the correctness of the foregoing authorities but argues (Pet. 35) that the decision below erroneously concluded that the district court had no discretion to permit it to intervene to challenge what it contends were unauthorized summonses. However, all the court of appeals held (Pet. App. A 17a) was that petitioner Westward had no cognizable interest in barring the production of the third-party bank and brokerage records sought by the summonses. Thus, under *Donaldson,* it could not intervene in the proceeding as a matter of right. In these circumstances, the district court properly exercised its discretion and refused to permit it to intervene. Moreover, as the court of appeals correctly observed (Pet. App. A 17a), "Westward was not prejudiced by the denial of intervention here, as its counsel admitted on argument of this appeal; it has been allowed to argue its cross-appeal and both Bank of Tokyo and Burbank have adopted its brief." [9]

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[9] Since the question of taxpayer intervention in a summons enforcement proceeding is a matter of discretion for the district court, the decision below does not conflict with *United States* v. *Lafko,* 520 F. 2d 622, 624 (C.A. 3), or *United States* v. *Wall Corp.,* 475 F. 2d 893, 895 (C.A.D.C.), in which the district courts permitted intervention.



## CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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